

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

VALERIE HIRATA, WHITNIE TAYLOR
and ANGELA JONES,

Plaintiffs,

v.

SOUTHERN NEVADA HEALTH
DISTRICT, GLENN SAVAGE, in both
his individual and official capacity,
ROSE HENDERSON, in both her
individual and official capacity, AMY
IRANI, in both her individual and
official capacity, SUSAN LABAY, in
both her individual and official capacity,
JACQUELYN RAICHE-CURL, in both
her individual and official capacity,
LORRAINE FORSTON, in both her
individual and official capacity, ANGUS
MACEACHERN, in both his individual
and official capacity, ROBERT
GUNNOE, in both his individual and
official capacity, KIM DIPASQUALE, in
both her individual and official capacity,
ROBERT NEWTON, in both his
individual and official capacity, CARA
EVANGELISTA, in both her individual
and official capacity, and LAWRENCE
SANDS, in both his individual and
official capacity,

Defendants.

Case No. 2:13-cv-2302-LDG-VCF

ORDER

1 The plaintiffs, Valerie Hirata, Whitnie Taylor and Angela Jones, have brought suit
 2 against their former employer, the Southern Nevada Health District ("SNHD"), as well as
 3 twelve of their former co-workers and supervisors, claiming that each violated 42 U.S.C. §
 4 1983, by using the plaintiffs' protected speech as a basis for harassment and retaliation.
 5 The plaintiffs further allege that such harassment constituted both a negligent and an
 6 intentional infliction of emotional distress, and that the harassment was so intolerable that
 7 each plaintiff's resignation amounted to a constructive discharge. Finally, the plaintiffs
 8 allege that the harassment by each defendant in their individual capacity was part of a civil
 9 conspiracy to violate the plaintiffs' rights. Eight of the defendants moved to dismiss the
 10 final claim (#20), a motion ultimately joined by the remaining five defendants (#30). The
 11 latter five defendants additionally moved to dismiss the first four claims contained in the
 12 complaint (#27). The plaintiffs oppose both motions (##33, 43), except as applied to their
 13 negligent infliction of emotional distress claim, to which the plaintiffs support dismissal
 14 (#45, 13:20). The Court will deny the first motion, and will grant the second motion in part
 15 and deny the second motion in part.¹

16 Motion to Dismiss

17 The defendants' motions to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6),
 18 challenge whether the plaintiffs' complaint states "a claim upon which relief can be
 19 granted." In ruling upon these motions, the Court is governed by the relaxed requirement
 20 of Rule 8(a)(2) that the complaint need contain only "a short and plain statement of the
 21 claim showing that the pleader is entitled to relief." As summarized by the Supreme Court,

22
 23 ¹ The court notes that on May 6, 2014, the magistrate judge granted a motion to
 24 extend discovery relating to qualified immunity to August 6, 2014, and ruled that motions
 25 based on that defense be filed by September 6, 2014. On July 11, 2014, the magistrate
 26 judge approved a stipulation to continue the qualified immunity discovery deadline to
 January 5, 2015, and rescheduled the settlement conference to be conducted on October
 20, 2014. The present ruling may refine the continuing discovery and upcoming settlement
 conference to the extent that certain claims are dismissed, but principal allegations and
 defenses remain.

1 a plaintiff must allege sufficient factual matter, accepted as true, “to state a claim to relief
2 that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
3 Nevertheless, while a complaint “does not need detailed factual allegations, a plaintiff’s
4 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels
5 and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
6 *Id.* at 555 (citations omitted). In deciding whether the factual allegations state a claim, the
7 court accepts those allegations as true, as “Rule 12(b)(6) does not countenance . . .
8 dismissals based on a judge’s disbelief of a complaint’s factual allegations.” *Neitzke v.*
9 *Williams*, 490 U.S. 319, 327 (1989). Further, the court “construe[s] the pleadings in the
10 light most favorable to the nonmoving party.” *Outdoor Media Group, Inc. v. City of*
11 *Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

12 However, bare, conclusory allegations, including legal allegations couched as
13 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555. “[T]he tenet
14 that a court must accept as true all of the allegations contained in a complaint is
15 inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “While legal
16 conclusions can provide the framework of a complaint, they must be supported by factual
17 allegations.” *Id.* at 679. Thus, this court considers the conclusory statements in a
18 complaint pursuant to their factual context.

19 To be plausible on its face, a claim must be more than merely possible or
20 conceivable. “[W]here the well-pleaded facts do not permit the court to infer more than the
21 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the
22 pleader is entitled to relief.” *Id.* (citing Fed. R. Civ. Proc. 8(a)(2)). Rather, the factual
23 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*,
24 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely
25 explained by lawful behavior, do not plausibly establish a claim. *Id.* at 567.

1 Factual Background

2 The plaintiffs, Valerie Hirata, Whitnie Taylor and Angela Jones, each worked with
 3 the Southern Nevada Health District (SNHD) for approximately 10 to 11 years, before each
 4 resigned between September and December of 2012 (#1, ¶¶ 5-7). The defendants include
 5 the SNHD, as well as its former employees and directors, including an environmental
 6 health director, environmental health supervisors, environmental health specialists,
 7 environmental health trainers, human resource administrators, human resource
 8 supervisors, human resource analysts and the chief health officer (#1, ¶¶ 8-19).

9 The plaintiffs allege that the Pool Plan Review Program, of which they were a part,
 10 instituted a variety of policy changes that would, in their opinion, lead to inadequate and
 11 unsafe pool inspections and approvals (#1, ¶ 33). In response, the plaintiffs, both
 12 individually and with other coworkers, filed a variety of complaints with their union
 13 representatives, as well as with a variety of supervisors and managers within SNHD.² The
 14 plaintiffs allege further that each of the defendants, individually and as part of a concerted
 15 effort to protect SNHD from accusations of malfeasance, retaliated against the plaintiffs
 16 through a variety of harassments and punishments (#1, ¶¶ 29, 501). Although two plaintiffs
 17 initially sought resolution of their concerns through their unions, each plaintiff ultimately
 18 resigned from her position, citing variously the “toxic,” “hostile, unhealthy and retaliatory,”
 19 and “intolerable” work environment (#1, ¶¶ 419, 440 & 489).

20 Claim 1 - § 1983 Civil Rights Violation

21 The plaintiffs allege that the defendants violated 42 U.S.C. § 1983 by depriving them
 22 of their First Amendment rights to free speech. They allege that “the harassing,
 23 threatening and retaliatory conduct of the defendants was the result of the plaintiffs raising
 24 concerns within SNHD and to outside federal and state agencies and local officials
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26 ² See, e.g., #1, ¶¶ 44-46, 59, 61, 96, 103, 106, 126, 131, 134, 137, 158, 380, 417.

1 regarding the unethical, unsafe practices of SNHD.” (#1, ¶ 24). Therefore the Court must
2 first determine whether the speech at issue was constitutionally protected. If the speech is
3 protected, the Court must then determine whether the defendants’ alleged threats and
4 retaliation amounted to a § 1983 violation.

5 The controlling Supreme Court decision is *Garcetti v. Ceballos*, which held “that
6 when public employees make statements pursuant to their official duties, the employees
7 are not speaking as citizens for First Amendment purposes, and the Constitution does not
8 insulate their communications from employer discipline.” *Garcetti v. Ceballos*, 547 U.S.
9 410, 421 (2006). The Ninth Circuit has provided a further test in order to determine when a
10 public employee’s speech receives First Amendment protection: “First, the plaintiff bears
11 the burden of showing that the speech addressed an issue of public concern Second,
12 the plaintiff bears the burden of showing the speech was spoken in the capacity of a private
13 citizen and not a public employee Third, the plaintiff bears the burden of showing the
14 state took adverse employment action and that the speech was a substantial or motivating
15 factor in the adverse action Fourth, if the plaintiff has passed the first three steps, the
16 burden shifts to the government to show that . . . the state’s legitimate administrative
17 interests outweigh the employee’s First Amendment rights Fifth and finally, if the
18 government fails the [above] balancing test, it alternatively bears the burden of
19 demonstrating that it would have reached the same adverse employment decision even in
20 the absence of the employee’s protected conduct.” *Eng v. Cooley*, 552 F.3d 1062 (9th Cir.
21 2009) (quotations and citations omitted).

22 The defendants’ motion to dismiss focuses on the second and third inquiry (#27, 19-
23 21). They argue that the plaintiffs have failed to plausibly allege that the contested speech
24 was not made in their role as public employees, and that they have failed to plausibly
25 allege that the contested speech was a substantial or motivating factor in the adverse
26 employment action.

1 The defendants contend that although “[p]laintiffs raised the issue over and over,
 2 verbally, through memoranda and formal grievances . . . [a]ll of those issues were raised
 3 within the scope of Plaintiffs’ professional duties in the Pool Plan Review unit” (#27, 19:14-
 4 17). The central determination therefore becomes whether or not part of the plaintiffs’
 5 employment duties included making such grievances. The Ninth Circuit has held that this
 6 issue is “a mixed question of fact and law.” See *Posey v. Lake Pend Oreille Sch. Dist. No.*
 7 *84*, 546 F.3d 1121, 1129 (9th Cir. 1008). The Court finds that for the purpose of meeting
 8 the *Iqbal* standard, the plaintiffs have plausibly alleged that such speech was made as
 9 private citizens, and is therefore protected.

10 In *Anthoine v. North Central Counties Consortium*, “a low-level employee . . . jumped
 11 the chain of command to report directly to the chairman of his employer’s governing board
 12 that his immediate supervisor had misrepresented the status of the employer’s compliance
 13 with its legal obligations.” *Anthoine v. North Central Counties Consortium*, 605 F.3d 740,
 14 744 (9th Cir. 2010). The Ninth Circuit held that whether this amounted to public employee
 15 speech or private citizen speech was an issue of fact for a jury. *Anthoine*, 605 F.3d at 750.
 16 In *Marable v. Nitchman*, the Ninth Circuit held that “complaining about corrupt practices of
 17 higher-level officials was entirely outside the duties of a ferry engineer.” *Anthoine*, 605 F.3d
 18 at 750 (citing *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007)).

19 The Court finds that a similar issue of fact exists in the instant case. The plaintiffs’
 20 complaint alleges that over the course of several years, one or more of the plaintiffs
 21 submitted a written group grievance to their union, which was forwarded to their human
 22 resources officials and one of their supervisors (#1, ¶¶ 44-46); attended a “Breakfast with
 23 the Boss” event with their chief health officer to express their concerns (#1, ¶ 59); later
 24 submitted the same grievance to their chief health officer (#1, ¶ 61); listed new concerns in
 25 letters to their supervisors (#1, ¶ 96); met to discuss department delays with a Clark County
 26 commissioner (#1, ¶ 103); submitted a letter to human resources asserting that they were

1 being targeted (#1, ¶ 106); met with a supervisor and environmental health manager, who
2 condemned the plaintiffs' communications with individuals outside the office (#1, ¶ 126);
3 met with the union to discuss a second grievance (#1, ¶ 131); submitted a second
4 grievance (#1, ¶ 134); held grievance meetings with union representatives and several
5 supervisors (#1, ¶ 137); held a further meeting with the environmental health manager and
6 human resources (#1, ¶ 158); submitted a complaint to supervisors (#1, ¶ 380); and
7 contacted "outside agencies" (#1, ¶ 417).

8 Some of these events may well have fallen within the duties of the plaintiffs'
9 employment. Yet, given the breadth of allegations - that plaintiffs raised complaints to their
10 environmental health manager, environmental health supervisors, chief health officer,
11 human resources representatives and union representatives - the Court cannot say that
12 plaintiffs' speech was not protected.

13 Having plausibly alleged that their speech may have been made as private citizens,
14 the plaintiffs must additionally allege that adverse employment action was taken due to that
15 speech. To sufficiently raise a civil rights claim against a municipality - in this case,
16 defendant SNHD - plaintiffs must allege that a policy or custom of the governmental entity
17 led to the constitutional violation. *Monell v. New York City Dep't of Social Services*,
18 436 U.S. 658, 690 (1978). To sufficiently raise a civil rights claim against individuals - in
19 this case, all of the remaining defendants - the plaintiffs must allege that the individuals
20 acted under the color of state law to deprive them of the constitutional right. 42 U.S.C.
21 § 1983.

22 The Court holds that the plaintiffs' allegations were sufficient. The plaintiffs allege
23 that they were criticized, harassed, investigated, paid less, demoted, transferred, placed on
24 leave, given different or greater workloads, and were otherwise retaliated against on the
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26

1 basis of their speech.³ The defendants argue that the cited events were not retaliatory, but
 2 were legitimate applications of the progressive discipline system agreed upon by SNHD in
 3 the plaintiffs' collective bargaining agreement. As the case continues, the defendants will
 4 be free to present evidence of such. At this early stage, however, accepting the plaintiffs'
 5 allegations as true, the plaintiffs have sufficiently demonstrated that they faced retaliation
 6 for their protected speech, and that such retaliation was undertaken both by individual
 7 defendants and, insofar as those defendants acted as policymakers, through customs
 8 established at the SNHD.

9 The Court will therefore deny the defendants' motion to dismiss as to the plaintiffs'
 10 first claim.

11 Claim 2 - Negligent Infliction of Emotional Distress

12 The plaintiffs have consented to the defendants' motion to dismiss as to this claim
 13 (#45, 13:20).

14 Claim 3 - Intentional Infliction of Emotional Distress

15 The elements of an intentional infliction of emotional distress ("IIED") claim are: "(1)
 16 extreme and outrageous conduct with either the intention of, or reckless disregard for,
 17 causing emotional distress, (2) the plaintiff's having suffered extreme emotional distress
 18 and (3) actual or proximate causation." *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 92
 19 (1981).

20 In their complaint, the plaintiffs summarize their intentional infliction of emotional
 21 distress allegations by stating:

22 511. Defendants engaged in extreme and outrageous conduct with the
 23 intent of, or with reckless disregard for whether it would cause the
 Plaintiffs emotional distress. Plaintiffs did in fact suffer extreme emotional

25 ³ See, e.g., #1, ¶¶ 34, 37, 51, 54, 62, 78, 90, 102, 111, 116, 122, 127, 128, 132,
 26 136, 144, 146, 150, 162, 163, 166, 195, 197, 199, 285, 289, 290, 293, 301, 313, 331, 339,
 341, 344, 346, 347, 350-51, 356, 363-64, 367, 380, 391, 403, 406, 416-418, 423, 427, 434,
 440, 458, 467, 469, 470, 473, 474, 479 & 489.

1 distress as an actual or proximate result of Defendants' conduct,
 2 including, but not limited to, giving the Plaintiffs extreme workloads with
 3 unreasonable working conditions; requiring Plaintiffs to approve pool
 4 inspections or plans that were unsafe, repaired and/or maintained
 5 incorrectly and a risk to public health; requiring that pool inspections be
 6 conducted on a daily basis oftentimes in the extreme heat as opposed to
 7 night or early morning hours; subjecting Plaintiffs to repeated discipline for
 8 no good reason; demoting, suspending and/or transferring Plaintiffs for
 9 reporting their concerns about management's conduct within the Pool
 10 Program to SNHD, outside agencies or local officials; and taking all
 11 measures possible to end their careers with the SNHD. As a direct result
 12 of Defendants' actions, Plaintiffs suffered great humiliation, severe and
 13 extreme emotional distress, pain and suffering, and will continue to suffer
 14 damages in an amount in excess of \$10,000.

15 The defendants argue, and the Court agrees, that such allegations are insufficient,
 16 and will therefore grant the defendants' motion to dismiss as to this claim. Many of the
 17 plaintiffs' allegations are entirely conclusory in nature, and thus are to be disregarded.
 18 Those allegations that remain - for example, that the plaintiffs were required to approve
 19 unsafe pools, that they were required to work in the heat, and that they were disciplined -
 20 do not sufficiently state a claim for relief under the tort of intentional infliction of emotional
 21 distress. As presented, the facts do not sufficiently allege that the defendants acted
 22 intentionally or with reckless disregard, nor do they sufficiently allege that the plaintiffs
 23 actually suffered extreme emotional distress. In their response to the motion to dismiss,
 24 the plaintiffs suggest that their medical records will be opened during discovery and may
 25 thereby affirm their emotional distress (#45, 13:14-16). Yet plaintiffs have not made
 26 allegations relating to such evidence in their complaint. Therefore, the Court will grant the
 motion to dismiss as to this claim.

21 Claim 4 - Constructive Discharge

22 According to the Nevada Supreme Court, a "tortious constructive discharge is shown
 23 to exist upon proof that: (1) the employee's resignation was induced by actions and
 24 conditions that are violative of public policy; (2) a reasonable person in the employee's
 25 position at the time of resignation would have also resigned because of the aggravated and
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1 intolerable employment actions and conditions; (3) the employer had actual or constructive
2 knowledge of the intolerable actions and conditions and their impact on the employee; and
3 (4) the situation could have been remedied.” *Martin v. Sears, Roebuck and Co.*, 111 Nev.
4 923, 926 (1995).

5 The defendants’ motion to dismiss argues that the plaintiffs’ resignations were not
6 reasonable, because the plaintiffs had not exhausted the grievance arbitration and appeals
7 process available to them through their union (#27, 23-24). While the Court agrees with the
8 defendants that this failure may demonstrate that the plaintiffs’ resignations were
9 unreasonable, the Court cannot say it is conclusive. Rather, the Court agrees with the
10 plaintiffs insofar as they interpret their collective bargaining agreement to *permit* pursuing
11 an appellate process, without *requiring* that all such avenues be exhausted before further
12 steps are taken. (#45, 14:19 - 17:8). At this time, the Court believes this question of
13 reasonableness is one best reserved for the jury, and therefore, the motion to dismiss as to
14 this claim will be denied.

15 Claim 5 - Conspiracy

16 The plaintiff’s final claim alleges that the defendants, acting as individuals,
17 committed civil conspiracy in that they “intentionally and unlawfully” sought to violate the
18 plaintiffs’ First Amendment rights and induce their resignations (#1, ¶ 528). “To state a
19 cause of action for civil conspiracy, the complaint must allege: 1) the formation and
20 operation of the conspiracy; 2) the wrongful act or acts done pursuant thereto; and 3) the
21 damage resulting from such act or acts.” *Ungaro v. Desert Palace, Inc.*, 732 F. Supp.
22 1522, 1532 n.3 (D. Nev. 1989).

23 “The alleged facts must show either expressly or by reasonable inference that
24 Defendant had knowledge of the object and purpose of the conspiracy, that there was an
25 agreement to injure the Plaintiff, that there was a meeting of the minds on the objective and
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1 course of action, and that as a result one of the defendants committed an act resulting in
2 the injury.”

3 The defendants, in a separate motion to dismiss (#20), as well as the plaintiffs, in
4 their response to the motion (#33), each spend significant time discussing the applicability
5 of the intracorporate rule, and its possible exceptions, to the complaint. The defendants
6 state that conspiracies cannot exist between employees and their employer, because they
7 are one legal entity (#20, 4-5). The plaintiffs respond that employees conspiring in their
8 personal capacity are not subject to the intracorporate barrier (#33, 7:11 - 8:13).

9 As the Court held in the plaintiffs’ first claim, the complaint has sufficiently alleged
10 that defendants acted in their individual capacity to deprive the plaintiffs of their First
11 Amendment rights. In replying to the plaintiffs’ response to the motion to dismiss, the
12 defendants argue that the plaintiffs have failed to allege that “any individual acted out of
13 purely personal interest,” arguing the plaintiffs only alleged that the individuals “may have
14 had a personal stake or bias” in the alleged conspiracy (#39, 4:25-27). The defendants cite
15 authority from the Eighth Circuit, Eleventh Circuit, Seventh Circuit, Southern District of New
16 York, and Northern District of Illinois⁴ for the proposition that the plaintiff must allege that
17 the conspiracy was “purely” or “solely” motivated by individual interest. However, even
18 among the cases cited, it becomes apparent that courts are split on the application of the
19 intracorporate rule or on the breadth of any exceptions to it. *See, e.g., Hartman v. Board of*
20 *Trustees*, 4 F.3d 465, 470 (7th Cir. 1993). One such case argues that an exception exists
21 when individuals have an “independent personal stake,” in the conspiracy, which is
22 precisely what the defendants in this case acknowledge the plaintiffs have alleged.
23 *Greenville Pub. Co., Inc. v. Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974). Lacking
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25 ⁴ *Cross v. General Motors Corp.*, 721 F.2d 1152 (8th Cir. 1983); *Hartman v. Board of*
26 *Trustees*, 4 F.3d 465 (7th Cir. 1993); *Denny v. City of Albany*, 247 F.3d 1172 (11th Cir.
2001); *Johnson v. Nyack*, 954 F. Supp. 717 (S.D.N.Y. 1997); *McCraven v. City of Chicago*,
18 F. Supp.2d 877 (N. D. Ill. 1998).

1 clearer direction from the Ninth Circuit or other courts within the Ninth Circuit, this Court will
2 err on the side of permitting discovery to better understand these allegations, and will
3 therefore deny the defendants' motion to dismiss this claim at this time.

4 Accordingly,

5 THE COURT **ORDERS** that Defendants' Motion to Dismiss (#20) is DENIED.

6 THE COURT **FURTHER ORDERS** that Defendants' Motion to Dismiss (#27) is
7 GRANTED as to Plaintiffs' negligent infliction of emotional distress and intentional infliction
8 of emotional distress claims, and is DENIED as to Plaintiffs' § 1983 claim and constructive
9 discharge claim.

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11 DATED this 26 day of September, 2014.

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Lloyd D. George

15 United States District Judge
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